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IN THE

Supreme Court of the United States

MICHELANGELO DELFINO AND MARY E. DAY,

Petitioners,

v.

AGILENT TECHNOLOGIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are employers categorically excluded from the definition of an "interactive computer service" set forth in the Communications Decency Act of 1996 ("CDA") — *i.e.*, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions"? 47 U.S.C. § 230(f)(2).[1]

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1. The two other questions supposedly presented in the Petition For A Writ Of Certiorari ("Petition") in fact are not. *See* Reasons for Denying the Petition, Section I *infra*.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Agilent Technologies, Inc. ("Agilent" or the "Company"), has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

The California court of appeal opinion below well sets forth the factual background of the case. (Petition Appendix ("Pet. App.") 6-11.)

Agilent does not contest the accuracy of Petitioners' factual statement of the case (Pet. 6-9), except as follows:

1. Agilent never identified Cameron Moore as "the user of the Agilent IP address from which emails had been sent by 'crack_smoking_jesus.'" (Pet. 8.) On July 30, 2002, Agilent provided information to the FBI identifying Moore as the user of the IP address associated with the alias "drcamster." (CT 366-67, 431-32, 739, 833-34.) Similarly, on August 2, 2002, Agilent provided information to the FBI identifying Moore as the user of the IP address associated with the alias "dr_dweezil2001." (CT 370.) The FBI did not share any information about the content of the emails or postings in question. (CT 366-68, 370, 431-32, 739, 833-34.)

2. On July 30, 2002, the FBI told Agilent for the first time that Delfino and Day had complained to the FBI that they had received some potentially threatening e-mails appearing to come from Moore. (Pet. 8.) The FBI did not share any information about the content of the messages in question, or indicate that any of the messages had been sent through Agilent's computer systems. (CT 366-68, 431-32, 739, 833-34.) During that same conversation, Agilent told the FBI that it would cooperate fully in the investigation. (*Id.*) The FBI thanked Agilent for its cooperation, and reassured Agilent that it was not planning to arrest Moore, was not after his

job, and did not consider him to be dangerous. (*Id.*) Agilent specifically asked the FBI whether "Moore was a threat to anyone and whether Agilent should be concerned about him," to which the FBI responded, "no." (*Id.*) The FBI said only that it wanted to speak with Moore and resolve the situation. (*Id.*)

3. On August 12, 2002, Moore provided Agilent with a copy of an August 6, 2002 letter that he had sent to the United States Attorney's Office in which he admitted to threatening Delfino. (Pet. 8.) In that letter, Moore did not admit to using Agilent's systems to transmit any threats. (CT 373, 392, 553-62.) Moreover, during Agilent's meeting with Moore earlier in the day on August 12, he specifically denied sending any threats to Delfino and Day through Agilent's systems. (Pet. 8; *see also* CT 372, 389-90, 427, 431-32, 592-95, 740-42, 794.)

4. Agilent's further investigation in August 2002 showed that in July 2002, Moore used Agilent's computer system to access the Internet and visit the Yahoo! message board for one of the Varian corporate plaintiffs. (Pet. 8.) On at least some dates in July 2002 when Moore visited the Yahoo! message board for one of the Varian corporate plaintiffs, threatening postings under the alias "crack_smoking_jesus" appeared. (*Id.* 9.) To the extent that the Petition suggests that Agilent was or should have been aware of the threatening content of any postings that Moore made on the Yahoo! message board for one of the Varian corporate plaintiffs under the alias "crack_smoking_jesus," it misrepresents the record. While Agilent's computer systems are able to track when an employee logs onto the Internet and when that employee logs onto a personal e-mail account or visits an Internet message board, the systems cannot track the content or recipient(s)

of e-mails the employee then may choose to send or the content of particular postings the employee then may choose to make. (CT 388 ("However, other than demonstrating that Moore was logging onto his Yahoo! email account under the alias 'Dreamster,' there was no way to tell what email messages, if any, he had sent, or to whom."); *see also* CT 362, 377, 378, 389.) Agilent was not aware of the content of postings that Moore made before August 12, 2002, until April 7, 2003, when the government finally provided it with a copy of the FBI's Criminal Complaint Affidavit against Moore. (CT 377, 401, 411.)

5. In late October 2002, Agilent reviewed postings on the Yahoo! message board for Agilent claiming that "death threats" were "traced to" or coming "from inside" Agilent. (Pet. 9 (citing CT 393, 597-98).) To the extent that the Petition suggests that these postings placed Agilent on notice of Moore's actual misconduct, as opposed to Petitioners' own speculation, it misrepresents the record. These postings concerned Petitioners' conjecture as set forth in their book, *Be Careful Who You SLAPP*, released in December 2002, and on their website, *www.mobeta.com*. (CT 393, 597-98.)

6. The Petition states that "[f]ollowing the August 2002 investigations, Moore continued to threaten Delfino and Day via pseudonymous Internet postings, despite his promise to the federal prosecutor to cease doing so." (Pet. 9.) This misstates the record; the cited reference is to a letter from Petitioners' attorney to the United States Attorney's Office enclosing "copies of recent message-board postings that *I believe* might have been made by one or both of the same perpetrators who have previously made threats under the pseudonyms 'crack_smoking_jesus,' 'fifthforeseman_2002' and others. Several of the new postings are threatening." (CT 1131-32 (emphasis added).)

Agilent does not dispute the accuracy of Petitioners' account of the proceedings below (Pet. 10-11), but adds the following additional information:

1. The California court of appeal affirmed the trial court's grant of summary judgment on the basis of CDA immunity. (Pet. App. 22-23.)

2. In the alternative, the California court of appeal held that even if Delfino and Day's claims are not barred by the CDA, summary judgment nevertheless was proper because there is no triable issue as to either intentional infliction of emotional distress or negligent infliction of emotional distress.

3. As to the claim for intentional infliction of emotional distress, the court of appeal found no triable issue of liability as to Agilent for Moore's conduct under a ratification, *respondeat superior*, or negligent supervision/ retention theory, as follows:

a. *Ratification*: The court of appeal found the factual record to be undisputed[2] that Agilent did not know about the content of threatening messages Moore allegedly sent prior to August 2002 until it received the FBI arrest affidavit on April 7, 2003; that Agilent shortly thereafter confronted Moore, who admitted for the first time that prior to August 12, 2002, he sent some communications through Agilent's computer systems "that could be interpreted as a threat" (recanting his prior statement to Agilent on August 12 that

2. The court of appeal on multiple occasions countered Petitioners' claim that material facts were disputed, expressly finding that their "improperly spliced" evidence "did not support their assertions." (Pet. App. 11 & nn.15, 29.)

he had not used Agilent's computer systems to send any threatening messages); and that Agilent immediately placed Moore on administrative leave and then terminated him. (Pet. App. 27-28.) There thus is no triable question of ratification. (*Id.*)

b. *Respondeat superior liability*: The court of appeal found that Moore's conduct in sending threatening e-mails and postings, even assuming he did so from Agilent's computer systems, was "plainly outside the scope of his employment with Agilent." (Pet. App. 31.) There thus is no triable question of *respondeat superior* liability. (*Id.* 33.)

c. *Negligent supervision/retention*: The court of appeal held that this claim fails for three independent reasons. First, Agilent owed no legal duty to Delfino and Day. (Pet. App. 35-37.) Second, even assuming Agilent owed a duty of care to Petitioners, there was no breach. (*Id.* 37-38 ("There were thus no facts presented suggesting that Agilent knew or had reason to suspect that Moore was engaged in improper on-the-job conduct.").) Third, even assuming *arguendo* the existence of a duty and breach thereof, there is no triable question of causation because there is no evidence that Moore in fact used Agilent's systems to threaten Delfino or Day after August 12, 2002 (when he was issued a stern warning by Agilent): "Thus, any negligent supervision/ retention of Moore by Agilent — which alleged negligence, as we have concluded, was devoid of factual support — was not the cause of plaintiffs' claimed injuries." (*Id.* 38.)

4. As to the claim for negligent infliction of emotional distress, the court of appeal analyzed it as a negligence claim and held that it fails for the same reasons as the negligent supervision/retention theory: "As we have discussed, the

undisputed evidence showed that plaintiffs did not establish the existence of duty, breach of duty or causation." (Pet. App. 38-39.)

REASONS FOR DENYING THE PETITION

I. THE FIRST AND THIRD "QUESTIONS PRESENTED" ARE NOT ACTUALLY PRESENTED IN THIS CASE.

A. The First Question — Whether Section 230 Provides Immunity From Both Distributor As Well As Publisher Liability — Is Not Actually Presented In This Case.

Petitioners submit that this case presents the question of whether the CDA immunizes providers and users of an interactive computer service from traditional publisher liability as well as notice-based distributor liability. Petitioners, in other words, seek review of the issue in the seminal case *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), and its progeny. *See Zeran*, 129 F.3d at 331, 332 (CDA immunity is broad and protects both publishers and distributors).

For a case to present the question of whether CDA immunity extends to distributors with notice, however, it must (at a minimum) involve the underlying subject, *i.e.*, a distributor with notice. This is not such a case. As the California court of appeal below concluded, Agilent as a factual matter had no knowledge of Moore's misconduct prior to April 2003, after which it immediately suspended him and then terminated his employment. (Pet. App. 27-28.)

Thus, even assuming *arguendo* that the first tendered question were answered in favor of Petitioners — *i.e.*, that distributors with notice are excluded from the CDA — the result of this case would be exactly the same. The court of appeal below correctly recognized this and noted that Agilent is immune under the CDA "*irrespective* of whether it is deemed to have been a publisher or distributor." (Pet. App. 23 n.25 (emphasis added).)

This case thus does not even present the first question Petitioners tender.[3]

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3. Review of first question would not be warranted at this time in any event. The claimed "split" in authority is illusory: Every single court to have considered and ruled on the issue has followed *Zeran* and held that CDA immunity is broad and extinguishes traditional publisher as well as notice-based liability. *See Batzel v. Smith*, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003) ("[E]very court to reach the issue has decided that Congress intended to immunize both distributors and publishers."), *cert. denied*, 541 U.S. 1085 (2004). The Petition so acknowledges (Pet. 16), but claims that there is a "split" in authority because there is some debate over whether the *Zeran* interpretation is correct. (Pet. 16-18 (relying on *dictum* in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003), and a dissent in *Doe v. America Online, Inc.*, 783 So. 2d 1010 (Fla. 2001), that are critical of *Zeran*).) This debate does not constitute a "split" in authority warranting this Court's review. (*See* Pet. App. 16-17 n.22 ("The Seventh Circuit Court of Appeals has acknowledged that there is no appellate decision contrary to *Zeran*'s holding that section 230(c)(1) affords immunity to web hosts and other Internet service providers for state-law claims based upon offensive material created by others and published over the Internet. The *Doe* court, however, recognized that there was a theoretical debate on the issue and concluded that it did not need to decide the question.").) Were it otherwise, every decision that has generated any comment or dissent (to wit, most every decision), would warrant review.

B. The Third Question — Whether CDA Immunity Encompasses "Non-Publication" As Well As Publication Torts — Is Not Actually Presented In This Case.

The third tendered question goes well beyond the specific facts and holding of the instant case — which is premised entirely on Moore's threatening e-mail messages and Internet postings, and Agilent's resulting liability (if any) — and thus does not involve any "non-publication" conduct. The third question thus is not even presented here.[4]

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4. The court of appeal below in any event correctly followed the prevailing view that CDA immunity applies to a host of claims, and is not limited to publication-based torts. (Pet. App. 20-21.) Petitioners contend that there is a "split" in authority as to this question; as with the first question, however, the claimed "split" is non-existent. Petitioners rely on *Zeran* and *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002), for the proposition that the CDA is limited to publication-based torts. (Pet. 24.) Neither case supports the claimed assertion; *Zeran* happened to involve a defamation theory (pleaded as emotional distress claims), while *Gentry* applied CDA immunity to plaintiff's claims for negligence, unfair competition, and violation of a state statute regarding the authenticity of sports memorabilia. Indeed, courts have applied CDA immunity to a wide variety of claims and conduct. *See, e.g., GTE*, 347 F.3d 655 (claims under 42 U.S.C. section 1983 and for negligent entrustment of a chattel); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 848-49 (W.D. Tex. 2007) (negligence for failing to prevent sexual predators from communicating with minors on-line); *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006) (housing discrimination); *Assoc. Bank-Corp. v. Earthlink, Inc.*, No. 05-C-0233-S, 2005 WL 2240952, at *4 (W.D. Wis. Sept. 13, 2005) (tortious interference with business relations, negligence, fraud).

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER LAW.

The second tendered question — whether the CDA categorically excludes employers from its definition of an "interactive computer service" — thus is the only question actually presented in this case. As set forth below, review of this question is not warranted.

A. Review At This Time Would Be Premature.

No other federal or state court has addressed the precise question of whether an employer who provides its employees with Internet access through servers may be an "interactive computer service" provider under the CDA (or whether, as Petitioners contend, an employer-exclusion somehow can be read into the CDA's broad definition). Review thus is not needed to resolve or settle any conflicts of authority on this particular issue.

Indeed, the lack of other considered views on the issue advises against review. CDA case law has developed steadily since the statute was enacted in 1996, and will continue to develop. The prudent course is to wait for other courts to contemplate this question in a variety of factual and legal contexts and to offer their opinions. Courts already have found a broad range of services to be "interactive computer service" providers (*see* section II.B.2 *infra*), and certainly will continue to expand and develop these interpretations, including whether the definition includes employers who provide their employees with Internet access. Conflict may never arise; if one later does, that would be the time for this Court's review.

B. The Decision Below In Any Event Correctly Applied Established Principles Of CDA Law To The Facts Of The Case.

While the California court of appeal decision below was the first to address the specific question of whether an employer may be an "interactive computer service" provider under the CDA, it did little more than apply established CDA principles to the specific facts and parties in this case. The decision in many respects is unremarkable; it is fully consistent with the legislative history and plain language of the CDA, as well as with other state and federal courts' uniformly broad interpretation of the CDA. Petitioners would read an employer-exclusion into the plain language of the CDA — thereby creating a "split" in authority which they claim warrants review (Pet. 20) — but this finds no support in the text or history of the CDA, and in fact would frustrate the goals of CDA immunity.

1. The decision below is fully consistent with the legislative history and intent of the CDA.

CDA immunity was designed to achieve two goals. (*See* Pet. App. 13-14.) First, recognizing that the Internet has "flourished" "with a minimum of government regulation," Congress sought to maintain "a free market" for interactive computer services "unfettered by Federal or State regulation." 47 U.S.C. § 230(a), (b). Second, Congress sought to encourage Internet service providers to self-regulate offensive content without the "specter of liability" for taking an active role in screening. *Id.*; *Zeran*, 129 F.3d at 331.[5]

5. *Accord Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (discussing the CDA's "two ostensibly competing purposes"; (Cont'd)

Consistent with these dual purposes — freedom of expression and self-regulation — section 230 was intended to confer broad protection to those who provide access to the Internet and who are in a position to filter or screen content created by others. As Representative Cox, one of the sponsors of section 230, explained during debate on the proposed section: Section 230 "will protect computer Good Samaritans, online service providers, *anyone who provides a front end to the Internet. . . .*" 141 CONG. REC. H8460-01 (Aug. 4, 1995) (statement of Rep. Cox) (emphasis added).

Protecting employers, such as Agilent, who provide their employees with access to the Internet and who take steps that they can to monitor content is fully consistent with the purposes of the CDA. Indeed, the House Conference Report expressly states that the definition of "interactive computer service" includes employers:

> The conference agreement adopts the House provision with minor modifications as the new section 230 of the Communications Act. . . . These protections apply to all interactive computer services, as defined in new subsection 230(e)(2), *including non-subscriber systems such as those operated by many businesses for employee use.*

H.R. REP. No. 104-458, Second Session, *appearing at* 142 CONG. REC. H1078-03 (Jan. 31, 1996) (emphasis added);

(Cont'd)

"So, even though the CDA overall may have had the purpose of restricting content, there is little doubt that the Cox-Wyden amendment, which added what ultimately became § 230 to the Act, sought to further First Amendment and e-commerce interests on the Internet while also promoting the protection of minors.") (citation omitted).

see also Eric M.D. Zion, *Protecting the E-Marketplace of Ideas by Protecting Employers: Immunity for Employers Under Section 230 of the Communications Decency Act*, 54 Fed. Comm. L.J. 493, 496 (2002) ("[I]t is evident from the language and legislative history of the Act that Congress intended employers to be covered under § 230.").

Section 230 thus was intended to confer immunity to all Internet intermediaries, including employers who provide their employees with Internet access. The decision below correctly so held, and requires no review.

2. The decision is fully consistent with the plain language and broad interpretation of the CDA.

Consistent with its broad intent, the CDA contains a broad definition of an interactive computer service:

> The term . . . means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service of system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(f)(2). *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (courts treat section 230 "immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service'"); *Batzel*, 333 F.3d at 1029 ("[T]he definition of 'interactive computer service' on its face covers '*any*' information services or other systems, as long as the service or system allows 'multiple users' to access 'a computer server.'") (citing

section 230; emphasis in original); *id.* at 1030 n.15 ("Other courts construing § 230(f)(2) have recognized that the definition includes a wide range of cyberspace services, not only internet service providers.").

As the court of appeal below recognized (Pet. App. 17-20), courts construing section 230(f)(2) thus have found a wide range of entities to be "interactive computer service" providers — from companies whose business is to provide access to the Internet,[6] to search engines who facilitate access to information once connected to the Internet,[7] to for-profit websites,[8] and to not-for-profit websites.[9] Courts also have

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6. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997) (AOL); *Assoc. Bank-Corp. v. Earthlink, Inc.*, No. 05-C-0233-S, 2005 WL 2240952, at *4 (W.D. Wis. Sept. 13, 2005) (Earthlink, an internet service provider).

7. *E.g.*, *Langdon v. Google*, 474 F. Supp. 2d 622, 631 (D. Del. 2007) (Google, Yahoo!, Microsoft); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) (Google); *Barnes v. Yahoo! Inc.*, Civ. 05-926-AA, 2005 WL 3005602, at *2 (D. Or. Nov. 8, 2005) (Yahoo!).

8. *E.g.*, *Universal Comm'cns Syst. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (operator of financial website and associated message board); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 & n.7 (2002) (on-line auction site); *Carafano*, 339 F.3d at 1124 (on-line dating service); *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F. Supp. 2d 1037, 1039 (N.D. Cal. 2004) (company that collects complaints of unsolicited commercial emails from customers and forwards them to internet services providers); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 40, 108 Wash. App. 454 (Wash. Ct. App. 2001) (online bookstore).

9. *E.g.*, *Batzel*, 333 F.3d at 1021 (museum security website dedicated to discussions of museum security and stolen art); *Hy Cite*

(Cont'd)

found individually-run web-based logs ("blogs")[10] and bulletin boards and other information-sharing websites[11] to qualify as "interactive computer service" providers. Finally, courts have found entities who provide computer service to access the Internet — like Agilent here — to fall within the "interactive computer service" definition.[12]

The decision below is fully consistent with these precedents. An employer like Agilent, which enables computer access by multiple users to a computer service, including access to the Internet, satisfies the both the letter

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Corp. v. badbusinessbureau.com LLC, 418 F. Supp. 2d 1142 (D. Ariz. 2005) (website allowing consumers to post consumer complaints); *Roskowski v. Corvallis Police Officers' Ass'n*, Civ. 03-474-AS, 2005 WL 555398, at *11 (D. Or. Mar. 9, 2005) (website maintained by police officer association as a forum to exchange ideas regarding the police chief); *Whitney Infor. Network, Inc. v. Xcentric Venture, LLC*, 199 Fed. Appx. 738, 739 (11th Cir. 2006) (consumer watch website where consumers post complaints).

10. *E.g.*, *Dimeo v. Max*, 433 F. Supp. 2d 523, 524 (E.D. Pa. 2006) (website run by an individual who wanted to "'share [his] adventures with the world'") (citation omitted; alteration in original).

11. *E.g.*, *Doe v. MySpace, Inc.*, 474 F. Supp. 2d at 848 (company providing "a forum for the exchange of information between third party users"); *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006) (community information-sharing website); *Donato v. Moldow*, 865 A.2d 711, 718 (N.J. Super. Ct. App. Div. 2005) (community bulletin board devoted to discussion of local government activities).

12. *E.g.*, *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 692 (2001) (library providing computers with Internet access); *PatentWizard, Inc. v. Kinko's, Inc.*, 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (copy shop renting computers with Internet access).

and spirit of the CDA's "interactive computer service" definition. *See Reno v. ACLU*, 521 U.S. 844, 851 (1997) (interpreting the CDA and noting that methods of accessing the Internet include connections and networks provided by businesses); Ian C. Ballon, *IP And Internet Litigation: Law And Developing Trends*, Practising Law Institute, 691 PLI/ Pat 245, 348 (March 7-8, 2002) ("The definition of 'interactive computer service' is broad enough to encompass any computer network, including an employer's computer network or intranet.") (citing 47 U.S.C. § 230(f)(2)); Caitlin Garvey, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology*, 25 U. Dayton L. Rev. 133, 139 (1999) ("Corporations with direct Internet connections meet the functional definition of an ISP. . . . [C]orporations with direct Internet connections are indeed ISPs and, therefore, should receive immunity from employee computer abuse.").

3. Petitioners' attempt to graft limitations onto the plain language of section 230 is not supported by the statutory language or intent.

Petitioners contend that the CDA's statutory language somehow should be read to carve out employers. (Pet. 20-23.) This argument is completely at odds with the plain language and intent of the CDA, and does not warrant review.

Delfino and Day point out that nothing in the CDA evinces an intent to *include* employers within the definition of an "interactive computer service." But this improperly presumes that the some sort of enumeration is required. It is not; where (as here) the statutory language is broad and inclusive, it is unnecessary for a legislature to give examples of covered entities. *Park 'N Fly, Inc. v. Dollar Park & Fly,*

Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").[13]

Petitioners nevertheless urge that an employer-exclusion should be read into the CDA's plain language. They argue that Congress somehow intended the broad "interactive computer service" definition to be limited to entities that are "in the business" of the Internet, and that protecting employers under the CDA would frustrate the statutory goals. (Pet. 21-22.) The statutory language, however, makes clear that Congress valued the Internet as a forum for freedom of expression, and wanted to promote access to it by protecting *all* Internet intermediaries. Congress found, among other things:

> The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

47 U.S.C. § 230(a)(1).

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13. In an attempt explain away the broad statutory language, Petitioners argue that Congress in 1996 could not have contemplated that employers would figure so prominently as providers of Internet access and so did not specifically exclude them. (Pet. 21.) This claim is squarely belied by both common sense (it was well known before 1996 that most employers' computer systems permitted Internet access), and the legislative history, which expressly includes employers who provide Internet access to their employees within the "interactive computer service" definition. (*See* section II.B.1 *supra*.)

> The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

Id. § 230(a)(3).

> Increasingly, Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Id. § 230(a)(5). Consistent with these findings, one purpose of the CDA is to "promote the continued development of the Internet and other interactive computer services and other interactive media." *Id.* § 230(b)(1).

There is simply no basis for Petitioners' suggestion that employers who act as Internet service providers are differently positioned with respect to section 230 than any other Internet service provider. When an employer provides its employees with Internet access, the relationship is analogous to that between business-and-customer or library-and-public.[14] Employees use employer-provided Internet to engage in the myriad of valuable activities Congress referenced when enacting the CDA; employers like Agilent satisfy both purposes of the CDA by enabling that activity and taking steps that it can to monitor offensive content. *See ACLU v. Reno*, 929 F. Supp. 824, 832-33 (E.D. Pa. 1996) ("Similarly, Internet resources and access are sufficiently important to many corporations and other employers that

14. Of course, with respect to the employer *qua* employer, the employer-employee relationship has particular characteristics and obligations that the CDA does not abrogate or affect.

those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network (and thus to the Internet). Such access might be used by, for example, a corporation involved in scientific or medical research or manufacturing to enable corporate employees to exchange information and ideas with academic researchers in their fields."), *aff'd*, 521 U.S. 844 (1997); *Millennium Enters., Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907, 913 (D. Or. 1999) ("[M]any corporations and other employers link their office networks to the Internet, thus providing their employees with direct or modem access to the Internet. . . . The World Wide Web ('The Web') is the most well-known and advanced method of locating and retrieving information on the Internet. . . . The Web contains information from a variety of sources and is accessible to Internet users around the world.") (citations omitted).

If anything, the rise of employer-provided Internet access — which the Petition describes in some detail (Pet. 14) — only underscores the importance of employers as Internet intermediaries and, correspondingly, that Congress correctly included them within the CDA's broad protection. This is because employers as a class — perhaps now more than any other single category — provide a large number people with access to the Internet, which directly promotes the growth of the Internet. *See* Mark Ishman, *Computer Crimes and the Respondeat Superior Doctrine: Employers Beware*, 6 B.U. J. Sci. & Tech. L. 6 (2000) ("One of several reasons for the Internet's phenomenal growth is that the Internet is accessible from anywhere (e.g., at the office, home, and while traveling). In addition, electronic mail ('e-mail') and Internet use in the workplace have experienced tremendous growth in the last five years. Consequently, the workplace has become increasingly dependent on the Internet, and this dependence

will continue through the new Millennium. The benefits produced by using the Internet and e-mail in the workplace are impressive.") (footnotes omitted); Nat'l Telecommc'ns & Info. Admin., *Falling through the Net: Defining the Digital Divide*, part II.B.2 (1999), *http://www.ntia.doc.gov/NTIAHOME/FTTN99/part2.html* ("By far the most popular place to access the Internet outside the home is at work. Of those who access the Internet outside of home, more than half (56.3%) of Americans access it at work . . . .").

Additionally, because employers as a class are responsible for providing Internet access to so many people, excluding employers from the definition of an "interactive computer service" (as Petitioners urge) also would frustrate the CDA goal of self-regulation. Employers, like any other Internet service provider, are able to take steps to monitor offensive content, and likewise are incentivized by the CDA to do so without the "specter of liability" for their actions. *Zeran*, 129 F.3d at 331.[15]

In sum, the language and intent of the CDA are broad, and manifestly encompass employers, as the court of appeal below correctly concluded. Petitioners' arguments — which fly in the face of the plain statutory language and intent — present no issue for review.

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15. Petitioners contend that immunizing employers would encourage employers to do nothing to monitor or screen offensive content. (Pet. 22-23.) In enacting section 230, however, Congress determined that conferring immunity would encourage self-regulation — not the opposite. *Zeran*, 129 F.3d at 331 ("Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230's broad immunity 'to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material.'") (citing 47 U.S.C. § 230 (b)(4)).

III. THERE ARE SEVERAL ALTERNATIVE GROUNDS FOR SUMMARY JUDGMENT

Review also should be denied because it would be pointless. Even if review were to be granted, and even if the Court were to agree with all of Petitioners' contentions regarding the CDA, the result of this case would not change because there are several alternative, state-law grounds for affirming the trial court's grant of summary judgment.

A. The Decision Below Correctly Rests On Several Alternative State-Law Grounds.

The California court of appeal below parsed the voluminous record (including Delfino and Day's "improperly spliced" evidence), and made clear multiple times in its decision that there is no triable question as to Delfino and Day's claims for intentional and negligent infliction of emotional distress. (Pet. App. 11 & nn.15, 29.) The court of appeal found the record to be uncontroverted that Agilent did not know, and had no reason to know, of Moore's misconduct prior to August 12, 2002; that Agilent nevertheless confronted Moore on August 12, during which he denied using Agilent's systems to send any threats; that Agilent first learned that Moore may have send threatening messages though its systems when it received the FBI arrest affidavit on April 7, 2003 and confronted Moore, who recanted his prior denial; and that immediately thereafter Agilent place Moore on administrative leave and then terminated his employment. (Pet. App. 6-11, 27-28, 37.)

The decision below analyzed the claim for intentional infliction of emotional distress and correctly concluded that summary judgment was proper under each of Petitioners'

theories of liability (*i.e.*, ratification, *respondeat superior*, and negligent retention/supervision). (*See* Statement of the Case, *supra*.) The court of appeal also correctly concluded that summary judgment is appropriate for the negligent infliction of emotional distress claim because there is no triable question of duty, breach, or causation. (*Id.*) These independent, state-law grounds supporting the summary judgment counsel against review.

Petitioners claim that the decision below is not supported by adequate and independent state-law grounds. (Pet. 24-26.) Specifically, Petitioners contend that a different CDA interpretation would alter the court of appeal's findings that Agilent owed no duty of care to Delfino or Day, and that there was no breach of any duty in any event. (*Id.*) This argument is precisely backwards. The existence of a substantive duty of care, and the standards for its breach, are dictated by state law. Section 230 of the CDA is designed to encourage interactive computer services to self-regulate content, but does not impose any duty to do so, and so does not inform state negligence law. Here, the court of appeal below correctly concluded that Agilent did not owe any duty to Petitioners under California state law. (Pet. App. 35-37.) Changing the CDA holding below would not alter this result.[16]

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16. *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003) — upon which Petitioners rely in support of their first tendered question (*see* note 3 *supra*) — makes clear that the state-law analysis is wholly independent of the CDA analysis. In *Doe*, the court affirmed CDA immunity for the communications company defendant who merely provided Internet access and web hosting services to companies that, in turn, sold illicit videotapes. *Id.* at 659. The court went on to question in *dictum* whether permitting the CDA to immunize knowing

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B. There Are Other Alternative State-Law Grounds For Summary Judgment That The Court Of Appeal Did Not Reach.

Agilent set forth at least two additional grounds for summary judgment, which the court of appeal below did not address. These arguments also independently support the result reached below.

1. The claim for intentional infliction of emotional distress fails because there is no triable issue of intent.

To establish intent as required to make out a *prima facie* of intentional infliction of emotional distress, Delfino and Day also must show that Agilent intended "to inflict injury or engaged in [conduct] with the realization that injury will result." *See Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991) (citation omitted). Moreover, Delfino and Day must demonstrate that Agilent's "outrageous" conduct was directed primarily at them. *See id.* at 903-06 (1991); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1002 (1993). Alternatively, Delfino and Day must establish that Agilent was aware of Delfino and Day's presence at the time of the "outrageous" conduct, and acted

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distributors who might otherwise be liable under state laws that impose a duty on interactive service providers to protect third parties, was consistent with the CDA's goals. *Id.* at 660. The court ultimately concluded that it did not need to reach the question because Illinois in that case — like California here — imposes no such duty and, therefore, that the possible inconsistency was not actually presented. *Id.* ("We need not decide which understanding of § 230(c) is superior, because the difference matters only when some rule of state law *does* require ISPs to protect third parties who may be injured by material posted on their services.").

with reckless disregard of the probability that Agilent's conduct would cause Delfino and Day severe emotional distress. *See Christensen*, 54 Cal. 3d at 903-06; *Potter*, 6 Cal. 4th at 1002.

There is no triable issue of intent here under either formulation. The undisputed facts demonstrate that Agilent never had any intent to cause, and never acted in reckless disregard of causing, Delfino and Day to suffer emotional distress. Indeed, Agilent at all times took reasonable steps to investigate and warn against Moore's alleged activities, did in fact stop him from using Agilent's systems to transmit threatening messages after August 12, 2002, and ultimately terminated Moore once it had the necessary evidence of misconduct.

2. Even if there were a triable issue of negligence, assumption of the risk applies as a defense.

"The defense of assumption of risk is available when there has been a voluntary acceptance of a risk, and such acceptance, whether express or implied, has been made with knowledge and appreciation of the risk." *Morton v. Cal. Sports Car Club*, 163 Cal. App. 2d 685, 688 (1958). Assumption of risk is a complete defense to a negligence claim. *See id.*

Here, Delfino and Day assumed the risk when they voluntarily, regularly, and repeatedly clicked onto Yahoo!'s and other Internet message boards about Varian to read every posting. Delfino and Day could have decided not to read postings directed at them, and/or clicked the "Ignore this User" option to avoid reading the postings, and thus not subject themselves to any threats or harassment. (CT 432, 704, 849.) Since Delfino and Day opened and read postings, they assumed the risk of any

alleged emotional distress that resulted from them. Moreover, Delfino and Day provoked the alleged threats in the first instance by engaging in what the United States Attorney found to be "provocative conduct" (CT 434, 925, 1792), and "infantile behavior which enraged Moore with many other individuals on Internet posting message boards." (CT 434, 927, 1792.)

CONCLUSION

The Petition should be denied. The court of appeal decision below does not present any legal issue that is worthy of review at this time (if at all). The decision in fact is fully consistent with the CDA's intent and plain language, and with courts' uniformly broad interpretation of its scope. Moreover, even setting aside the issue of CDA immunity and considering Petitioners' claims on their merits, review would be pointless because, as the court of appeal correctly found, summary judgment rests on several, alternative and independent state-law grounds.

Respectfully submitted,

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